CONDITIONS OF PROGRESS IN EMPLOYERS' LIABILITY LEGISLATION

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In order to disarm criticism, I want to say frankly, at the outset, that if any one, at the conclusion of my remarks, says, it has been merely the accentuation of the obvious, I shall plead guilty, and it seems to me that what is needed just at this time is to accentuate the obvious, for we seem to be overlooking it very decidedly. Our topic is "recent progress in legislation," and I am going to take legislation in its very broadest sense, that is, the making of laws. Law, in a self-governing political organization represents the crystallization of public opinion; it represents the formal expression of what the community thinks is the right and the wrong in a given set of social or industrial relations. Therefore, progress in legislation starts with the forming of a public sentiment. In many cases, such as the present case, it consists in reforming public sentiment, and public opinion. We have, for three-quarters of a century, in the relation of employer and employee in matters of injury, been governed by a law which peculiarly enough, does not conform to any acceptable definition of law. It does not represent the crystallization of any opinion except the individual opinion of a single English judge. It is the best example I know of, of what might be called, "judge made" law. One always speaks with respect of the court, but when the court has been dead for fifty years or so, perhaps one can venture liberties without danger of being in contempt; and it is not too much to say, that the opinion of the judge, in which he laid down what has been the law of liability since his time, was a parody on logic and a travesty on justice. He gave that ruling at a time when the industrial revolution had almost accomplished itself, when production on a large scale and the factory system had been well established, and he set out by saying that he gave this decision, because of the absurd consequences which would follow from a ruling otherwise; and then, closing his eyes to the whole trend of industry, he based every single argument

upon what would happen in domestic service. He laid down the doctrine that the employee assumed the risk of his employment, and that that risk included the risk of accident from the negligence or the mistake of a fellow-servant. Now it might just as easily have happened that another judge would have decided that the contract for employment involved the idea that the employer guaranteed the employee against accident, and agreed to compensate him, therefore, and if that had been the personal idiosyncrasy of the judge deciding it, it would have been the law to-day. The effort we are making to-day, is an attempt to get away from that hard and fast rule of law which, as I said, in its inception, simply represented the "personal idiosyncrasy" of the particular judge who decided the case. As Berrell has said, "There was read into the assumed contract of employment a clause which employer or employee had never dreamed of, and which neither of them to this day has been able clearly to understand."

As the first step in legislation is the formation of sound public opinion, we may say the progress that has been made in the matter of employers' liability and workmen's compensation is simply phenomenal. I know of no change, no fundamental change, in an existing legal system, which has made the progress within a period of four or five years that this movement has made. If any one had said to us five years ago that within half a decade we should have heard eminent members of the bar, distinguished employers of labor on a large scale, standing up and assailing that law as iniquitous, and clamoring for change, we would probably have said that our prophet ought to be the subject of a writ *"de lunatico inquirendo."* And yet only the most drastic criticisms of the law that I have yet heard have come, during this meeting, from gentlemen like Mr. Hammond, Mr. Dickson, of the Steel Corporation; and Mr. Schram, of the Brewers' Association, in which they have denounced it as iniquitous and unjust in the last degree.

On most subjects we can say there are two sides—often more. In this question there is only one side. It does not seem to me it is open to discussion. As a distinguished politician was once quoted as having said, "There are some things not open to discussion. If you will take the commandment, 'Thou shalt not steal,' and a man says, 'let us discuss it,' don't discuss it with him—search him." The same thing is true here. When a man sets out to advo-

cate the justice of the present legal system in relation to employers' liability, do not argue with him, investigate and try to find the basis of his hallucination.

After we have converted public opinion, the next step is to set in motion the machinery by which to give formal expression to that public opinion and embody it in formal law. Now the ordinary machinery of giving expression in formal shape to public opinion is legislation. What I want to invite your attention to here—I am not criticising it, I am simply inviting attention—is the basis of our entire system of legislation. In the first place our legislatures are ordinarily slow to act and properly so. They want to be sure that that to which they are giving formal expression and more or less permanent form, really represents the matured and deliberate wishes of the community. We have, therefore, started out and made the legislature, bi-cameral, with two houses, one of which shall be immediately responsible to public sentiment, by having to go back at very short intervals, and stand before the public for re-election; the other we have deliberately removed further, so that it is made less amenable to public sentiment. We have done that deliberately, in order that there might be certain obstacles placed in the way of immediate expression of popular opinion. But we have gone further than that. After that second house, removed, more or less, from the influence of public opinion has passed its judgment, we have then submitted that to the veto power of the governor—again a procedure adopted, and I think properly, in order to make the expression of popular opinion in a formal manner more deliberate and slow-moving. Now, if we ask what progress we have made so far in this phase of the enactment of legislation concerning employers' liability, we can say again, that the progress is most remarkable. At the present time ten different states have, by legislative enactment, appointed commissions to inquire into the subject of existing statutes, and report to the legislatures. Two states have already passed laws, and in two or three other states laws have passed one of the houses. I venture to say, if there were no other obstacles, that within the next ten years, three-fourths of the states would have passed "compensation acts" to replace employers' liability statutes. Our progress in this respect, more so the recent progress, has been remarkable.

The bi-cameral legislature and the government do not repre-

sent the entire machinery of expressing in formal manner the public opinion, and public understandings of right and wrong. We have here, again, given what we may call a power of "veto" to the court. While the governor's veto is restricted in no way—he may veto the law for any reason he pleases—we have given a restricted "veto" to the court. It may only "veto" the law within certain limits, within certain restrictions, which have been clearly defined, and which we all understand. Now, if we ask ourselves, what progress we have made in recent legislation, with reference to employers' liability, so far as this part of the mechanism is concerned, we will have to answer—nothing. We have made no progress. The recent decision of the New York Court of Appeals, a unanimous opinion, indicates that we have not gone any further than where we started from. In fact, we may be said to have gone backwards. We had an idea, a few weeks ago, that we had gotten a good way, only to find we have not gotten anywhere. Our hopes have had a setback, and in a sense we are not as far as when we started out.

Let us consider a moment further. Where does the court get this right of "veto?" It gets it from the constitution, and I want to invite your attention particularly to this fact, that the constitution is nothing more than another form of law. The making of constitutions is also part of the mechanism by which we give formal expression to the public will. Now, what I ask your attention particularly to, is this point, in the constitutional law, that is, in the law most directly enacted by the people themselves, we have placed further checks upon the right to immediately enact our views into the permanent form of law.

In our constitutions we embody those views of right and wrong which we desire enacted into law of more permanent and lasting form than the ordinary legislative enactments; and we have set limits beyond which our legislative bodies are not to go. If they, in their enactments, go beyond the limits fixed by the constitution, they violate, as it were, the law which the people themselves have passed. When a court of such high distinction, and we may assume the court of one of the great states of the Union is a court of high distinction, gives a unanimous decision against the constitutionality of a law, I think even the most reckless of us must assume that the law very likely was unconstitutional. But do not turn around and

attack the court. The court has done exactly what we put it there to do, and we are angry because our carefully devised system has proved so thoroughly effective. Now, that is what we are facing to-day. We have deliberately adopted a system, as I said, to make difficult the putting into operation of any new theories of right and wrong, and then when we attempt to enact into law a thing upon which we are all agreed, and find we have violated our own fundamental law, we grow angry with the courts.

It seems to me we are very much in the position of the dog that runs and bites the stone that struck him. It may be that we are hit, and hard hit, by the decision of the New York Court of Appeals, but the Court of Appeals is merely the stone that struck us. The power that threw the stone is the constitution that the people themselves have adopted.

All this leads up directly to one point. We have heard suggested various methods of how we can get around the constitutional difficulties. It has been suggested that we can adopt state insurance, and by the adoption of the taxing powers establish rules for the public welfare, and defeat the constitution; in other words, that we can do by indirection, what we have forbidden ourselves to do by direction. It has also been suggested that we may take away the employers' defence, and leave the compensation law optional, but this is "optional" in a truly pickwickian sense. He can take it, or pay the penalty. Now, that is no more fair, not more "optional" or free in the accurate or correct sense, than it is to say that the workman has freedom of contract. It is a counterfeit freedom, a mockery, a sham.

I am not going to discuss the merits of state insurance versus private insurance. It may or may not be better. But do not let us be driven into it because we cannot do the other thing. Let us set out to amend our constitutions so that we shall have freedom to choose between systems and adopt the one we think is best. In other words, let us accept frankly the system of legislation we have adopted, and one which, I for one, am not yet willing to abandon. Let us face it squarely, and live under it, and let us start the machinery of legislation, which means legislation by the people themselves, and amend the state constitutions until we have freedom of choice in adopting a reasonable and just system of workmen's compensation; let us have entire freedom to adopt that one which

serious study and frank discussion shall convince us is the right and proper one to adopt. In other words, to repeat, let us accept the constitutional system we have adopted, let us live under it, let us be consistent and logical, and let us set about effecting that kind of legislation in which we have as yet made no progress.

The time is ripe for it. I know of no other subject upon which it is as easy to convince the fair-minded person. I believe that, judging by the experience of the past four years, in the propaganda being carried on, there is no topic on which it would be so easy to convince a person of the injustice of the present system, and no topic on which it would be so easy to secure constitutional amendment, as on the subject of employers' liability and workmen's compensation.